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No. 98-84

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

v.

R. M. SMITH,

Respondent.

On Writ of *Certiorari* to the United States
Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C., AND SOUTHERN POVERTY
LAW CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE¹

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ has litigated numerous discrimination in education cases under federal civil rights laws, including Title IX of the Education Amendments Act of 1972 ("Title IX") and Title VI of the Civil Rights Act of 1964 ("Title VI").

Founded in 1971, the Southern Poverty Law Center ("SPLC") has litigated scores of pioneering civil rights cases on behalf of minorities, women, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement, and many other victims of injustice. SPLC has filed both administrative and federal court complaints under Title VI.

Amici are concerned about the implications of this case beyond the narrow issue of whether the National Collegiate Athletic Association ("NCAA") may be subject to the requirements of Title IX. The NCAA argues that its amenability to suit under Title IX hinges on whether it is a recipient of federal funds. Although Respondent and *amici* disagree with this claim, the

¹ Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for either party authored the brief in whole or in part, and no person or entity other than *amici curiae* made any monetary contribution to its preparation or submission.

same factual question arguably governs the NCAA's potential liability under a variety of other civil rights laws. Thus, if the decision below is reversed on the ground that the NCAA is *not* a recipient of federal funds, then the NCAA's accountability could be improperly limited under all of the civil rights statutes prohibiting discrimination in federally funded programs and activities.²

TLPJ and SPLC are co-counsel for the plaintiffs in *Cureton v. National Collegiate Athletic Ass'n*, a national race discrimination class action pending in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 97-131, which charges the NCAA with violating Title VI and certain federal agency regulations promulgated thereunder. Specifically, *Cureton* charges that the NCAA's rule for determining whether incoming freshmen may participate in intercollegiate athletics and receive an athletic scholarship discriminates against African-American student-athletes. The NCAA has defended the case on numerous grounds, including that it is not a recipient of federal funds within the meaning of Title VI.

Based on the record developed in *Cureton*, we submit this brief to apprise the Court of an additional basis for affirming the Third Circuit's judgment that the NCAA may be a recipient of federal funds subject to Title IX. Because the district court denied

² These statutes include Title VI, 42 U.S.C. § 2000d, prohibiting race and national origin discrimination; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibiting disability discrimination; and Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102, prohibiting age discrimination. Title IX, like the Rehabilitation Act and the Age Discrimination Act, was modeled on Title VI and contains identical language regarding federal funding. This Court has assumed the meaning of the funding language in these statutes to be the same. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 (1982); see also *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605, 610 (1986); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635-36 (1984).

Respondent's motion for leave to amend her complaint, she did not have an opportunity to develop a record on the possible grounds for holding that the NCAA is a recipient of federal funds subject to Title IX. *Amici* were permitted to develop such a record for their Title VI claim in *Cureton*, compiling evidence of the NCAA's receipt of federal funds from the United States Department of Health and Human Services ("HHS") to operate the National Youth Sports Program ("NYSP"). Indeed, the plaintiffs in *Cureton* submitted sufficient evidence of the NCAA's receipt of federal funds for the NYSP to withstand the NCAA's motion for summary judgment on that issue. *Cureton v. NCAA*, No. Civ. A. 97-131, 1997 WL 634376, at *2 (E.D. Pa. Oct. 9, 1997).³

The plaintiff in this case, Renee Smith, specifically argued to the Third Circuit that the NCAA is covered by Title IX because it receives federal funding for the NYSP, but the Third Circuit's ruling was not based on this ground. This Court may nevertheless consider any ground that would support the Third Circuit's judgment and affirm on an alternative basis. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions").⁴ We therefore urge the Court to consider the NCAA's receipt of federal funds from HHS as an alternative ground for affirming the Third Circuit's judgment.

³ Portions of the record developed in *Cureton* have been included in materials that *amici* have lodged with the Court for its convenience ("Lodged Materials").

⁴ This Court repeatedly has held that the prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). In any event, the Court has inherent authority to consider issues that were not presented in a petition for *certiorari* and not raised in the courts below. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980); *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970).

STATEMENT OF THE CASE

This case arises out of Respondent Renee M. Smith's effort to hold the NCAA accountable for discriminating against her on the basis of her sex, in violation of Title IX, 20 U.S.C. §§ 1681 *et seq.* See Pet. App. 1a-2a, 3a-4a.⁵ Specifically, Smith alleges that the NCAA violated Title IX by granting a disproportionate number of waivers of its athletic eligibility rules to male student-athletes. *Id.* 29a. The NCAA moved to dismiss this claim, arguing that Smith had failed to allege that the NCAA is a recipient of federal funds and that, in any event, she could not establish that the NCAA receives any federal aid that would trigger Title IX coverage. See *id.* 29a. The district court granted the NCAA's motion and dismissed Smith's *pro se* complaint for failure to state a claim upon which relief could be granted. *Id.* 33a.

Shortly after the district court dismissed Smith's Title IX claim, Smith sought leave to amend her complaint to allege that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." *Id.* 18a (quoting proposed amended complaint). The district court denied Smith's motion, stating only that the motion "is denied as moot, the court having granted defendant's motion to dismiss . . ." *Id.* 36a.

Smith filed an appeal in the Third Circuit. She argued that the district court should have permitted her to amend her complaint because "the NCAA directly and indirectly receives federal funding, which makes the [NCAA] a 'recipient' of federal aid and subject to Title IX scrutiny." Smith Brief at 9. Smith further contended that "[t]he NCAA's National Youth Sports Program receives direct federal funding." *Id.* at 22.⁶

⁵ The Appendix to the Petition for *Certiorari* is cited as "Pet. App."

⁶ This argument was also raised in the Brief of *Amici Curiae* National

The Third Circuit reinstated Smith's Title IX claim, holding that the district court erred in denying her motion for leave to amend. *Id.* 17a, 20a. According to the Court of Appeals, Smith's proposed amended complaint would not have been futile because Smith alleged facts "which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX." *Id.* 18a. Focusing on Smith's proposed allegation that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance," the Court of Appeals held that "this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss." *Id.* 18a-19a. The Third Circuit further noted that the district court would have to address the merits of Smith's claim on remand "if Smith can prove her allegations to support the applicability of Title IX to the NCAA." *Id.* 19a n.9.

In holding that the NCAA may be subject to Title IX, the Third Circuit emphasized two aspects of the NCAA's relationship with its member colleges and universities: (1) the NCAA is an organization created by and comprised of federally funded educational institutions which acts as their "surrogate" with respect to athletic rules; and (2) the NCAA receives annual dues from its federally funded member institutions. *Id.* 15a, 16a, 19a. The Third Circuit did not rule on an additional ground presented to support the applicability of Title IX to the NCAA – that the NCAA receives federal funding from HHS to operate an education program known as the NYSP. As we now explain, evidence from the *Cureton* lawsuit that is currently being prosecuted by *amici* demonstrates that the NCAA receives federal funding through HHS, and thus is subject to suit under the full

Women's Law Center *et al.*, filed in support of Smith in the Third Circuit, at 5 n.3.

panoply of civil rights laws prohibiting discrimination in federally funded programs, including Title IX.

SUMMARY OF ARGUMENT

The issue in this case is whether Renee Smith's proposed amended complaint is sufficient to state a Title IX claim against the NCAA. Although Smith's original *pro se* complaint did not allege that the NCAA was a recipient of federal aid, her amended complaint alleged that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Pet. App. 18a (quoting proposed amended complaint).

The Third Circuit correctly held that Smith's proposed amendment would not have been futile and that the district court erred in denying her motion for leave to amend. In ruling that the NCAA may be subject to Title IX, the Third Circuit focused on the NCAA's relationship with its federally funded member institutions. *Id.* 15a, 16a, 19a. *Amici* believe that the Third Circuit's grounds for reinstating Smith's Title IX claim support affirmance. But the Court should also be aware that there is an alternative basis for affirming the Third Circuit's judgment that Smith alleged facts "which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX." *Id.* 18a. Regardless of whether the NCAA is subject to Title IX because of its relationship with its federally funded member institutions, it is nevertheless covered by the statute because of its receipt of a grant from HHS.

The record developed by *amici* in *Cureton*, their Title VI suit against the NCAA, shows that the NCAA has been receiving a grant from HHS since 1969 to operate the NYSP. The NCAA was a direct recipient and the named grantee of those funds for at least 22 years, from 1969 through 1991. Since 1992, the National

Youth Sports Program Fund (the "Fund"), an NCAA affiliate, has been the nominal recipient of the NYSP grant. The sworn testimony of an NCAA official confirms that the NCAA created the Fund to receive the NYSP grant solely to evade coverage under the civil rights statutes prohibiting discrimination in federally funded programs. But, as *amici's* efforts in *Cureton* make clear, the Fund cannot insulate the NCAA from liability under the federal civil rights laws.

The record in *Cureton* demonstrates that the Fund is a mere conduit through which the NCAA receives federal aid to operate the NYSP. Indeed, the NCAA wields complete control over the Fund and the NYSP grant. For example, the Fund's board of directors is comprised solely of high level NCAA employees and the chair of the NCAA's NYSP Committee; the Fund has no offices, employees, or letterhead; the NCAA's NYSP Committee, not the Fund, runs the NYSP and has final authority over all decisions involving participation in the program and distribution of the federal grant; and the federal grant is disbursed through a bank account in the NCAA's name, not the Fund's. In addition, HHS itself views the NCAA as the recipient of the NYSP grant, notwithstanding that the Fund is the nominal grantee.

The Fund's status as a mere conduit for the NYSP grant renders the NCAA amenable to suit under Title IX. This is true whether the NCAA is viewed as a direct or an indirect recipient of federal funds. The NCAA's effective control over the Fund and the operation of the NYSP support piercing the Fund's corporate veil, thereby making the NCAA a direct recipient of the federal grant. Alternatively, the NCAA's relationship with the Fund, at a minimum, makes the NCAA an indirect recipient of the federal grant. Under either alternative, the NCAA is a recipient of federal financial assistance within the meaning of Title IX – and is prohibited by that statute from discriminating against Renee Smith on the basis of her sex.

ARGUMENT

THE DECISION TO REINSTATE SMITH'S TITLE IX CLAIM SHOULD BE UPHeld AS THERE IS AN ALTERNATIVE GROUND FOR RULING THAT THE NCAA MAY BE A RECIPIENT OF FEDERAL FUNDS WITHIN THE MEANING OF TITLE IX.

Title IX prohibits discrimination against persons on the basis of sex "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). As a threshold matter, it is well settled that Title IX covers both direct and indirect recipients of federal funds. *Grove City College v. Bell*, 465 U.S. 555, 564, 569-70 (1984) (holding that indirect recipients of federal aid, such as colleges whose students receive federal financial assistance, are covered by Title IX). Indeed, HHS's regulatory definition of a "recipient" demonstrates that there is no meaningful distinction between direct and indirect recipients for purposes of triggering Title IX coverage:

Recipient means . . . any public or private agency, institution, or organization, or other entity . . . to whom Federal financial assistance is extended, *directly or through another recipient*, and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assign, or transferee thereof.

45 C.F.R. § 86.2 (h) (emphasis added).

As we now explain, the record developed by *amici* in *Cureton* demonstrates that the relationship between the NCAA and the Fund makes the NCAA a "recipient" of federal financial assistance within the meaning of Title IX. At a minimum, the NCAA's effective control over the Fund makes the NCAA an indirect recipient of the NYSP grant from HHS. But there is also

ample evidence to support piercing the Fund's corporate veil. The NCAA would then be a direct recipient of the NYSP grant, even though the Fund is now the nominal grantee. Under either perspective, there can be no question that the NCAA is amenable to suit under Title IX and the other civil right statutes with comparable funding provisions. *See supra* note 2, at 2.

I. The Record in *Cureton* Demonstrates that the Fund is a Mere Conduit Through Which the NCAA Receives Federal Aid to Operate the NYSP.

Amici's efforts in *Cureton* make clear that the NCAA was a direct recipient and the named grantee of federal aid from HHS for at least 22 years. In response to discovery propounded in *Cureton*, the NCAA admitted that it was "a recipient or grantee of federal funds for the NYSP" from 1969 through 1991.⁷ The NYSP is an enrichment program for economically disadvantaged youths that provides summer education and sports instruction on the campuses of NCAA member and non-member institutions of higher education.⁸

Since 1992, the NCAA has been receiving federal funds to operate the NYSP through the Fund, a non-profit corporation created by the NCAA.⁹ But the fact that the NCAA is no longer the named grantee of federal funds for the NYSP does not insulate it from Title IX's expansive reach.

⁷ Lodged Materials, Ex. A (Defendant's Objections and Responses to Plaintiffs' Interrogatories and Requests for Admissions and Production of Documents (Set II)) at 3-20.

⁸ See Lodged Materials, Ex. B ("Guidelines for the 1993 National Youth Sports Program") at NCAA 009886; Ex. C (1996 Press Release on NYSP issued by HHS's Office of Community Services).

⁹ See Lodged Materials, Ex. A at 21-26; Ex. D ("Articles of Incorporation of a General Not for Profit Corporation").

Title IX broadly defines a "program or activity" to include "all of the operations" of an educational entity, "any part of which is extended Federal financial assistance." 20 U.S.C. § 1687.¹⁰ Prior to the passage of the Civil Rights Restoration Act of 1987 ("CRRRA"), Pub. L. No. 100-259, 102 Stat. 28 (1988), this Court had limited Title IX's coverage to the specific programs or subparts of the entity that received federal funds. *Grove City*, 465 U.S. at 570-74. But the CRRRA eliminated this program-specific construction in favor of far more expansive coverage.

The NCAA incorporated the Fund just one year after Congress reaffirmed the broad coverage of Title IX and similar civil rights statutes by passing the CRRRA.¹¹ The NCAA created the Fund to serve as the named grantee for the HHS-funded NYSP in an effort to distance itself from the expansive reach of federal civil rights laws like Title IX. As Frank Marshall, the NCAA's Group Executive Director for Finance and Business Services, and an officer and director of the Fund, testified in his *Cureton* deposition:

Over time the NCAA has wanted to insure that it is not a recipient or a contractor of the federal government and has tried to manage the NYSP program in accordance with that. The NYSP fund I believe was created to be the grant recipient related to the NYSP grant to help insure that distinction.

Lodged Materials, Ex. E (Deposition of Frank Marshall) at 31-32.

The discovery in *Cureton* reveals, however, that the Fund is merely a conduit through which the NCAA receives federal aid to

¹⁰ It is beyond dispute that intercollegiate athletics is an educational program or activity under Title IX. See, e.g., 34 C.F.R. § 106.41; *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997).

¹¹ See Lodged Materials, Ex. D.

operate the NYSP. That being so, the Fund cannot insulate the NCAA from liability under the federal civil rights laws.

A. The NCAA Wields Complete Control Over the Fund and the NYSP Grant.

Although the NCAA created the Fund to serve as the grant recipient for the NYSP, the NCAA itself continues to make all decisions regarding the NYSP's operation and use of the federal grant from HHS. In addition, even though the Fund nominally controls the NYSP, the NCAA itself controls the Fund: pursuant to the Fund's bylaws, three of the Fund's four directors are high level NCAA officers or employees (including the NCAA's Executive Director), and the fourth director is the Chairperson of the NCAA's NYSP Committee.¹² Moreover, according to Edward A. Thiebe, the NCAA's Director of Youth Programs, the NCAA's NYSP Committee runs the NYSP. Lodged Materials, Ex. H (Deposition of Edward A. Thiebe) at 16-17, 58, 60, 79.

The NCAA's NYSP Committee has final approval over which colleges and universities may participate in the NYSP as subgrantees (*id.* at 58, 79), and over which schools are in good standing and may continue to participate in the program. *Id.* at 58, 60. In addition, the NCAA has stipulated that actions taken by its NYSP Committee are final actions with respect to the NYSP in that no further action or authorization is required by the Fund or the NCAA to implement the committee's decisions. *Id.* at 96-97.

¹² Lodged Materials, Ex. F ("Bylaws of the National Youth Sports Program Fund") at 1-2; see also Lodged Materials, Ex. G (Excerpts from "1995-96 NCAA Annual Reports") at 51. The NCAA's control over the Fund is also evidenced by the Fund's Articles of Incorporation, which provide that all of the Fund's assets will be distributed exclusively to the NCAA upon the Fund's dissolution. Lodged Materials, Ex. D at 3, ¶ 8.

The fact that the NCAA – rather than the Fund – operates the NYSP is further confirmed by an agreement between the NCAA and the Fund in which the NCAA acknowledged that it had been performing the administrative services needed to operate the NYSP for many years and agreed to continue doing so, provided that the Fund paid the NCAA annual consideration of one dollar.¹³ Moreover, as part of its “administrative” responsibilities for the NYSP, the NCAA handles the receipt and disbursement of the federal grant money through an account that it opened at United Missouri Bank.¹⁴ The bank account is not in the Fund’s name; rather, the account’s title is “The National Collegiate Athletic Association – The National Youth Sports Program.”¹⁵

The Fund’s failure to observe standard corporate formalities provides further evidence of the NCAA’s control over the Fund and the federal aid provided for the NYSP. The Fund has no offices, no employees, and no letterhead. Lodged Materials, Ex. E at 13, 42; Ex. H at 44. In addition, the Fund has never held a board of directors meeting. Lodged Materials, Ex. E at 76. Nor has it performed anything other than ministerial functions since its inception. *Id.* at 73-74. In short, the NCAA exerts complete control over the Fund and the operation of the NYSP.

B. The Conduct of Both HHS and the NCAA Regarding the NYSP Demonstrates that the NCAA is a Covered “Recipient” under Title IX.

Although the Fund has been the nominal recipient of the NYSP grant since 1992, the conduct of both HHS and the NCAA since

¹³ Lodged Materials, Ex. I (“Agreement”) at 1, 2.

¹⁴ *Id.* at 69-70.

¹⁵ Lodged Materials, Ex. J (Letter from David A. Bruton to Danielle Banks dated September 5, 1997) at 2.

that time demonstrates that the Fund is an artifice through which the NCAA continues to receive the federal aid. For example, in response to a complaint lodged with HHS alleging that the NCAA discriminated on the basis of sex in its intercollegiate championship tournaments, HHS wrote as follows:

The NCAA . . . is a recipient of Federal financial assistance through a Community Services Block Grant from this Department. Therefore, we have accepted and will investigate your complaint under the authorities of the OBRA [Omnibus Budget Reconciliation Act of 1981] Community Services block grant provisions, which prohibit discrimination on the basis of sex, and Title IX.

Letter from HHS to Title IX complainant dated November 4, 1994.¹⁶ Similarly, when HHS completed its investigation of that complaint, it stated:

The investigation was conducted under Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, 45 C.F.R. Part 86; and the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35). Because HHS funds were involved, NCAA is subject to the nondiscrimination provisions of the above-referenced Acts and regulations.

Letter from HHS to Title IX complainant dated March 10, 1998.¹⁷

HHS’s references to the “grant” received by the NCAA relate to the NYSP. HHS provides federal assistance for the NYSP through the Community Services Block Grant provisions of the

¹⁶ See Lodged Materials, Ex. K at 1.

¹⁷ See Lodged Materials, Ex. L at 1.

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 42 U.S.C. § 9910c, *as amended by* § 205, Pub. L. No. 103-252, 108 Stat. 623 (1994). The dates of the HHS letters quoted above are significant because both were written after the NCAA began receiving aid for the NYSP through the Fund. Apparently, the fact that the NCAA is no longer the named grantee is of no import to HHS. HHS continues to treat the NCAA as a covered recipient under Title IX.

The NCAA's application for HHS funds in 1993 is further evidence of the artificial distinction between the NCAA and the Fund. Notwithstanding that the Fund became the nominal grant recipient in 1992, the NCAA prepared and submitted form guidelines ("Guidelines") in 1993 which identified the NCAA – not the Fund – as the grantee. Lodged Materials, Ex. B at NCAA 009890; Ex. H at 29-31. The Guidelines also described the NCAA's responsibilities for the program as follows:

NCAA program direction and control, including institution selection, approval of proposed projects, responsibility for project detail and execution by participating institutions.

Lodged Materials, Ex. B at NCAA 009890. Similarly, the Guidelines described the program's resources and funding as follows:

The NCAA has been awarded a grant by the OCS [United States Department of Health and Human Services, Administration for Children and Families, Office of Community Services] and will award subgrants to designated institutions whose budgets have been approved by the NYSP Committee in accordance with these guidelines.

Id.

Finally, a press release issued by HHS in 1996 is yet another indicia of the artificial distinction between the NCAA and the Fund. In that press release, HHS identifies the NCAA as the recipient of the annual grant to operate the NYSP:

An annual grant is made to a national, non-profit organization to operate the National Youth Sports Program (NYSP). . . . In FY [Fiscal Year] 1996, \$11,520,00 was awarded to the NCAA which contracts with some 173 colleges and universities in 44 States to provide sports instruction and enrichment activities to disadvantaged youngsters from ages 10 to 16 for a summer program.

Lodged Materials, Ex. C (emphasis added). Although the press release was issued four years after the Fund became the named grantee, HHS nonetheless continued to regard the NCAA as the entity that receives the grant and operates the program.

In short, the NCAA's role in administering the NYSP remained essentially unchanged after the Fund became the named grant recipient in 1992. The NCAA continues to perform the same functions and services for the NYSP that it performed when it was the named grantee, and the NCAA's NYSP Committee still has final decisionmaking authority over the program's operations and the distribution of the HHS grant to participating institutions. Indeed, just last year, the NCAA's Executive Director described the NYSP as "one of the NCAA's best kept secrets" and characterized the program as the NCAA's "partnership with the federal government."¹⁸ Accordingly, the Fund is nothing more than an artifice through which the NCAA receives federal financial assistance.

¹⁸ Lodged Materials, Ex. M (NYSP Annual Report) at NCAA 001438.

II. The Fund's Status as a Mere Conduit for Federal Aid Renders the NCAA Amenable to Suit under Title IX.

A. The NCAA is a Direct Recipient of the NYSP Grant Because the Fund is Nothing More than the NCAA's "Alter Ego."

The fact that the Fund is a mere conduit for federal aid means that the NCAA is, in reality, a direct recipient of federal financial assistance within the meaning of Title IX and all similar civil rights laws. It is well settled that a court may disregard the corporate form to prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy. *See, e.g., First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629, 630 (1983); *Publicker Industries, Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979).

When deciding whether to apply the "alter ego" theory and disregard the corporate entity, courts consider various factors including, *inter alia*, whether the corporation has failed to observe corporate formalities, how the corporation operates and the defendant's relationship to that operation, and whether the corporate form is being used to defeat legislative policies. *See First Nat'l City Bank*, 462 U.S. at 630 (corporate form will not be recognized when interposed to defeat legislative policies); *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981) (factors include failure to observe corporate formalities); *DeWitt Truck Brokers, Inc. v. W. Ray Fleming Fruit Co.*, 540 F.2d 681, 685, 686 (4th Cir. 1976) (factors include failure to observe corporate formalities, and how corporation operates and defendant's relationship to operation).

Three main factors described above warrant piercing the Fund's corporate veil and treating the NCAA as a direct recipient of the NYSP grant: (1) the degree of control that the NCAA wields over the Fund; (2) the Fund's failure to observe corporate formalities; and (3) the NCAA's creation of the Fund to evade coverage under federal civil rights laws like Title IX. All of these factors compel a finding that the NCAA is, in reality, a direct recipient of federal financial assistance within the meaning of Title IX.

B. At a Minimum, the NCAA Indirectly Receives the NYSP Grant Through the Fund.

Regardless of whether the factors described above are sufficient to warrant piercing the Fund's corporate veil, they nevertheless compel a finding that the NCAA indirectly receives the NYSP grant through the Fund. The record developed in *Cureton* demonstrates that the NCAA effectively controls and operates the Fund. The record in *Cureton* also shows that the NCAA created the Fund to receive the NYSP grant solely to avoid coverage under the civil rights laws prohibiting discrimination in federally funded programs. Thus, even though the Fund is the named recipient of the NYSP grant, it is merely a conduit through which the NCAA receives the grant. At a minimum, the NCAA is therefore an indirect recipient of federal aid – a fact which, standing alone, is sufficient to render it amenable to suit under Title IX. *See Grove City*, 465 U.S. at 564, 569-70 (indirect recipients of federal financial assistance are covered by Title IX).

In addition, Title IX's expansive definition of a "program or activity" compels a finding that the NCAA indirectly receives the NYSP grant through the Fund. As set forth above, Title IX defines a "program or activity" to include "all of the operations" of a covered entity, "any part of which is extended Federal financial assistance." 20 U.S.C. § 1687.

Under the plain terms of the statute, the NCAA is unquestionably a covered "program or activity." The NCAA fits well within two parts of Title IX's definition. First, it satisfies the requirements of subsection (3)(A)(ii) of the statute because the NCAA is a "private organization" which is "principally engaged in the business of providing education." *Id.* § 1687(3)(A)(ii). Second, it satisfies the requirements of subsection (4) because it is an entity established by two or more federally funded colleges or universities. *Id.* § 1687(4).¹⁹ This means that *all* of the NCAA's operations are covered by Title IX, if *any part* receives federal financial assistance. The record in *Cureton* shows that the Fund is a "part" of the NCAA's "operations," and that the Fund receives federal financial assistance from HHS for the NYSP. As such, the NCAA indirectly receives federal aid through the Fund and is therefore covered by Title IX.

In short, the record in *Cureton* supports affirmance of the Third Circuit's judgment that Smith is entitled to amend her complaint to allege that the NCAA is a recipient of federal funds within the meaning of Title IX. The *Cureton* discovery makes clear that Smith will be able to support her allegation that the NCAA receives federal financial assistance. Smith's proposed amended complaint alleges that "[t]he NCAA is a recipient of federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." Pet. App. 18a (quoting proposed amended complaint). Either the Fund is the NCAA's "alter ego" through which the NCAA directly receives the NYSP grant, or the Fund is an affiliate through which the NCAA indirectly receives the NYSP grant. Smith's proposed amendment entitles her to an opportunity to develop a record supporting either scenario.

¹⁹ The district court in *Cureton* held that the NCAA was a "program or activity" covered by Title VI under subsection (4) of that statute, which is identical to the corresponding subsection in Title IX. *Cureton*, 1997 WL 634376, at *2.

CONCLUSION

For these reasons, we urge this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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